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SUPREME COURT OF THE UNITED STATES

No. 749.

OCTOBER TERM, 1882,

THE WIGGINS FERRY COMPANY,
Plaintiff in Error.

vs.

THE CITY OF EAST ST. LOUIS.

In Error to the Supreme Court of the State of Illinois.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT OF THE PLAINTIFF IN ERROR.

H. P. BUXTON, ATTORNEY FOR PLAINTIFF IN ERROR.

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STATEMENT.

This suit was originally brought by the City of East St. Louis, against the Wiggins Ferry Company, in the City Court of East St. Louis.

The Declaration filed in said City Court, Dec. 17th, 1880, alleges that from Jan. 1st, 1875, hitherto the Ordinances of said City required all persons or corporations using ferry-boats within said City to take out a license for the same at the rate of One Hundred Dollars for each boat for one year, and that the plaintiff in error during all that time had, and was using ten

ferry-boats, upon which it was required to take out such licences, which it did not do, nor pay the money required by said Ordinances for said license, which now amounts to ten thousand dollars, whereby an action hath accrued to said City by force of the Statute and Charter of said City and its Ordinances to demand and recover of the plaintiff in error the said sum of money. The second count of the declaration alleges that plaintiff in error is indebted to said city in the sum of ten thousand dollars for the license of certain ferry-boats, which had become due by reason of its failure to procure and pay for such license as required by the Charter and Ordinances of said City. [Printed Record p. 3.]

The general issue was pleaded and the case was submitted to the Court upon the following agreed statement of facts:

That by authority of an act of the Legislature of the State of Illinois, entitled "An act to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi," approved March 2, 1819, and amendatory acts, the said Wiggins and his associates did establish, maintain and operate a ferry upon and over the Mississippi River, between the City of St. Louis, in the State of Missouri, and the Illinois shore of said river, opposite to said City of St. Louis, now within the limits of the City of East St. Louis, from about the time of the passage of said act of 1819, until the organization of "The Wiggins Ferry Company," in the year 1853, under and by authority of an act of said Legislature, entitled "An act to incorporate the Wiggins Ferry Company," approved February 11, 1853.

That in the year 1853, under authority of said act of 1853, the successors, heirs and assigns of said Wiggins, the then owners of said ferry and ferry franchise, and of all the rights, privileges and immunities granted to said Wiggins and his successors, heirs and assigns, by proper deeds and assignments, conveyed the same to plaintiff in error, they having become the stockholders of said ferry company; and from thence hitherto, plaintiff in error remained the lawful owner of said ferry, ferry franchise, rights, privileges and immunities aforesaid, including the ferry-boats, wharf-boats, wharfs and landings in use by said ferry, and also the rights, privileges, immunities and franchises

granted by said act of 1853, and amendatory acts, and that under and by authority of all said grants, privileges and immunities, plaintiff in error maintained and operated said ferry from thence hitherto.

That the said Mississippi River, at said point between the states of Illinois and Missouri, upon and over which said ferry is established and operated, under the laws of the United States and the rules and regulations established thereunder by the duly authorized officers of the United States, has been declared to be and is a navigable river within the purview of such laws, and under said laws, rules and regulations, and especially in conformity with the Revised Statutes of the United States, Title L, Regulation of vessels in domestic commerce, the plaintiff in error for the last twenty years and more, has been required to, and has had all its ferry-boats, all of which are of more than twenty tons burden, reguarly enrolled and annually inspected and licensed, at an annual cost of from seventy-five dollars to one hundred dollars per boat, according to tonnage and number of men employed on each, including hospital dues and other fees and charges under said laws and regulations.

That the plaintiff in error ever since its organization, has paid to the County of St. Clair as and for a ferry license, the sum of $300 per annum, under the laws of the State of Illinois, and the requirements of the County authorities.

That the plaintiff in error ever since its organization, has owned the wharfs and landings used by said ferry in said City of East St. Louis, which it graded and paved at its own expense, and that it has never used or employed any wharf or landing belonginig to said City of East St. Louis.

That the plaintiff in error ever since its organization, has annually listed for taxation, and paid all taxes legally assessed upon all its property, and that all its personal property, inlcluding its boats and franchises, and all its real estate, which is within the city limits, and including its wharfs and landings; have been taxed by said city of East St. Louis ever since the organization of said city.

That the following ferry companies own and operate ferries over and across the Mississippi River, between the City of St.

Louis and the Illinois shore, but without the limits of the City of East St. Louis, both in active competition with the ferry of plaintiff in error, neither of which are, or ever have been, required to pay any sum whatever for license, to either the City of East St. Louis, or any other Municipal corporation, except the County of St. Clair, to which they pay license as follows, that is to say: Illinois and St. Louis Ferry Company, $...per annum; St. Louis add Cahokia Ferry Company, $... per annum.

The St. Lonis Bridge Company, which owns and operates a bridge over the Mississippi River, between the cities of St. Louis and East St. Louis, which has been in active competition with the plaintiff in error ever since said bridge was open for use, in July, 1874, is required to pap no license fees whatever to the City of East St. Louis.

That June 1, 1868 the City Council of the City of East St. Louis duly passed and published 'Ordinance No. 70," parts of which are as follows:

Sec. 1. No persons, firm, company or corporation shall be engaged in, prosecute or carry on any trade, business, calling or profession hereinafter mentioned, without having first obtained a license therefor:

Sec. 10. Keepers of ferries shall pay fifty dollars license for each boat plying between this City and the oppisite bank of the River, for one year, or twenty-five dollars for each boat, for six months.

That in compliance with the above ordinance, the plaintiff in error paid said City a license fee of fifty dollars per annum on each of its ferry-boats, its last license thereunder being from May 1, 1874, to May 1, 1875.

That August 6, 1874, said City Council repealed said Ordinance No. 70, and enacted Ordinance No. 239 in its place, to the same tenor and effect, except that it required $150 license fee per annum for each boat.

That Nov. 30, 1877, said City Council passed Ordinance No. 307, the third section of which is as follows:

Sec. 3. No license for any purpose whatever shall be required, exacted or collected for or on account of the City, and all Ordinances and resolutions in relation to licenses, are hereby repealed.

That Octoder 7, 1878, said City Council passed Ordinance No. 317, which is substantially the same as Ordinance No 70, except that it fixes the license fee at $100 per annum for each boat.

That May, 1, 1875, and from thence hitherto the plaintiff in error in the operation of its said ferry between said Cities of St. Louis and East St. Louis, has employed eight steam ferry-boats (including two tugs and one transfer boat) and since said May 1, 1875, has not taken out any license, nor paid any license fee to the City of East St. Louis.

Upon the facts here stated, and the laws applicable thereto, the Court shall determine the right of appellee to demand, and the liability of appellant to pay, the license fees fixed by said ordinances, or either of them, and render judgement accordingly; and this without regard to the pleadings in the case.

That the acts of the Legislature, and the laws, rules and regulations of the United States, and the enrollments, inspections and licenses herein mentioned or referred to, and the Charter and Ordinances of said City of East St. Louis, or copies thereof, may be used and referred to as a part of the record in this case, without proof or authentication, and without being copied into the record in this case, either in this Court or any other Court to which this case may be taken. Printed Record p. 5-7.

Sample copies of the Enrollments, Inspections and Licenses of the Steam ferry boats of the plaintiff in error are filed in this Court under this agreement. (Printed Record pp 22-25.)

Judgment was rendered against the plaintiff in error which has been affirmed by the Supreme Court of the State of Illinois.

ASSIGNMENT OF ERRORS.

The Supreme Court of Illinois erred in affirming the judgment for the following reasons:

I. Because it is in derogation of the authority exercised by the plaintiff in error under the Constitution and Laws of the State of Illinois ,as granted in its Charter from said State, and is therefore repugnant to that clause of the Federal Constitution which prohibits the passage of any law by a State impairing the obligation of contracts.

II. Because it is in derogation of the authority exercised under the Statutes and regulations of the United States, by the plaintiff in error, in operating its steam ferry-boats upon the waters of a navigable river:

III. Because it is a regulation of commerce between the States and is therefore void.

IV. Because it is a tonnage tax and is therefore void.

BRIEF AND ARGUMENT.

I.

It is claimed by the plaintiff in error that the grants to Samuel Wiggins by the act of 1819, and amendatory acts, and the grants in the plaintiff's Charter of 1853 constitute a contrac t between the plaintiff and the State of Illinois:
Mills vs. the County of St. Clair, 2 Gillman, 226;
and that these grants are irrovocable:
Terrett vs. Taylor, 9 Cranch, 50.
Fletcher vs. Peck, 6 Cranch, 136.
State of New Jersey vs. Wilson, 7 Cranch, 166.
State Bank of Ohio vs. Knoop, 16. Howard, 369.
and that this contract is impaired by the exaction claimed in this case.

The grant is as follows:

"An Act to authorize Samuel Wiggins to establish a Ferry upon the waters of the Mississippi," approved March 2nd, 1819, (Session laws of Illinois, 1819, p. 105.) contains the following provisions:

Sec. 1. That Samuel Wiggins, his heirs and assigns, be and they are hereby authorized to establish a ferry on the waters of the Mississippi near the town of Illinois, in this State, and to run the same from lands at the said place that may belong to him.

Sec. 4. That the ferry hereby established shall be subject to the same taxes as are now, or hereafter may be imposed on other ferries within this State and under the same regulations and forfeitures.

"An Act to incorporate the Wiggins Ferry Company," approved February 11th, 1853, (Private laws of Illinois, 1853, p. 193.) after reciting the above act of 1819, and amendatory acts, provides:

Sec. 1. That (certain persons named) and their associates, successors and assigns are hereby created a body corporate and politic by the name and style of the "Wiggins Ferry Company,"

* * * and the said Company shall have full power to do the following acts: * * * to purchase, hold, use and enjoy the ferry franchise granted to Samuel Wiggins, his heirs and assigns, by the act referred to in the preamble of this act. * * * 5th, to keep a ferry or ferries at and from any point or points on said land, across the Mississippi River to St. Louis in the State of Missouri, and to remove the same from place to place on the same lands as necessity or convenience may require, use boats or other crafts, propelled by steam, heat or other power, and possess, use and enjoy all the rights, privileges, franchises and emoluments recited in the preamble of this act as having been heretofore granted to the said Samuel Wiggins, his heirs and assigns, on and from the lands to be purchased as herein provided for, and generally to do and perform all things in reference to the ownership, control, management, use and disposition of said ferry franchise, ferry and lands, and of the business carried on thereat, which a natural person might or could do."

"Sec. 7. * * * *Provided* that nothing in this act contained shall be construed to create any private right so as to interfere with the powers of any existing municipal corporation, or with the right of the legislature, at any time hereafter, to create municipal corporations within the limits herein specified, and to confer upon said corporations all such powers of police * * * as may be usually or properly confided to a city corporation under the Constitution of Illinois."

The demand in this case is Ordinance 317 of the City of East St. Louis, as stated in the agreement on which the case was originally, submitted, "that keepers of ferries shall pay one hundred dollars license for each boat per annum."

The authority to pass this Ordinance is granted to the defendant by its Charter "to regulate, tax and license ferry boats" Private Laws of Illinois, 1869. vol. 1. p. 893. The Charter of 1865 referred to by Judge Walker in his opinion in this case was superceded by the act of 1869. The difference in the two acts is that the act of 1865 authorized she City "to license, tax and regulate ferries," while the latter act, and the one in force when the Ordinance complained of was passed, is as above stated.

To maintain this demand the defendant must have authority to collect it as a tax, or as a regulation, or as a license, in either of which forms it is claimed to be in violation of the contract.

Is it a tax? The plaintiff insists that it is. If it is, then it is in violation of the grant to Wiggins which says that "the ferry hereby established shall be subject to the same taxes as are now or hereafter may be imposed on other ferries within this State," and it is not claimed that "other ferries" are subjected to this burden, but the contrary is agreed to be the fact.

The Constitution and laws of Illinois call this character of demand a tax.

The Revised Statutes of Illinois of 1845 Chapter 42 contain the following:

"Sec. 10. All ferries * * * which have, at any time, been established * * * shall be and they are hereby declared to be established ferries * * * within the meaning of this chapter.

Sec. 14. All ferries * * * which now or hereafter may be established as aforesaid shall be subject to an annual tax of not less than two, nor more than one hundred dollars in the discretion of the county commissioners court of the county in which the same shall be located; which tax, when assessed, shall be collected and paid over as the other taxes are, and shall constitute a part of the county revenue."

Again in "an act to improve the roads in the Illinois bottom" approved Feb. 27. 1847. (Laws of 1847. p. 91.) the legislature say it is a tax. viz:

"Sec. 10. All taxes imposed or assessed upon any ferry license for any ferry across the Illinois river, shall be and the same is hereby appropriated" &c.

Sec. 2. Article 9. of the Constitution of Illinois of 1848 is as follows:

Sec. 2. The general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and

not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, bankers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, toll bridges, and ferries, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct.

The constitution of Illinois of 1870. Article 9. entitled. "Revenue" contains the following:

"Sec. 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, but not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law uniform as to the class upon which it operates."

"Sec. 9. the general assembly may vest the corporate authorities of cities * * * with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

It will thus be seen that both the Constitution of 1848 and of 1870 and the laws of Illinois regard this demand as a tax. As a tax it cannot be maintained in this case, because it is in violation of the State Constitution which limits the legislature in its power to authorize such taxes "by generel law uniform as to the class upon which it operates."

The Charter of East St. Louis is a special law and under the Constitution of 1870, all charters by special law are absolutely prohibited. (Constitution of 1870, Art. 4 Sec. 22.)

The plaintiff further Claims that this demand is a tax upon property, and void under the Constitution of Illinois, quoted above, as not based upon value. The grant to the City to tax ferry-boats, cannot be held to authorize it to tax them in any other manner than other property in the State is taxed, that is by valuation as required in the Constitution of 1848 and 1870. By the agreed case it will be seen that plaintiff in error has been assessed and has paid all City, County and State taxes on all its droperty by valuation, not only its ferry-boats and other property, but its capital stock and ferry franchise, the same as other ferries in the State. That the plaintiff's boats could be taxed as property is beyond question, but only under a valuation as required by the State Constitution.
Transportation Co. vs. Wheeling 99, U. S. 273.

The Supreme Court of Illinois, in affirming the judgment in this case, to avoid the force of these obstacles in the Constitution and laws of Illinois, and the Charter rights to the plaintiff, held tnis exaction was not a tax, but a license fee, thus enabling the City to accomplish by an indirection what could not lawfully be done in a direct manner.

It is further claimed that this demand is void because it is not "uniform as to the class upon which it operates," as required by the Constitution of 1870. As shown in the agreed case it does not operate upon the Illinois & St. Louis Ferry Company nor the St. Louis & Cahokia Ferry Comyany although they own and operate ferries over Mississippi river between the City of St. Louis and the Illinois shore, in active competition with the plaintiff. Niether does it operate upon the St. Louis Bridge Company, in active competition with plaintiff. All these are certainly of the same "class." All are carrying passengers and frieght to and from St. Louis over the Mississippi river.

That this demand is in violation of plaintiff's Charter rights, as a license fee or regulation is equally plain. It can only be subjected " to the same regulations and forteitures" as "other ferries."

It will be conceded that the only regulation sought or attempted by this Ordinance by the city of East St. Louis, is that

the plaintiff pay into its treasury $100 per annum for each of its boats.

It is no regulation to simply demand the payment of money.
New York vs. R. R. Co., 34 Barb. 41.
Mayor vs. R. R. Co. 32 New York, 261.

"Concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former right, unless such appears to have been the legislative intent, *does not give the authority* to prohibit, or *to use the license as a mode of taxation with a view to revenue*, but a reasonable fee for the license and the labor attending its issue, may be charged. Respecting amusements, exhibitions, etc., the authority of the corporation, under the power to license, has been regarded as greater then when the same word is employed as to trades and occupations."
Dillon Mu. Cor. 2d Ed., sec. 291.

This is in exact accord with the spirit of all the decisions on the subject. Large sums as licenses of billiard rooms, dramshops, bowling-alleys, and the like are maintained on the ground that the public welfare may require such places to be regulated and restrained or altogether prohibited. But useful trades and occupations need no such restraining regulations. The object of the law is to exact from each and all their just proportion of the public burden. Now, then, can it be said this franchise should again be taxed in the name of a "license?"

The provision of plaintiff's charter, that its ferry should be subject to the same taxes as then were or might thereafter be imposed on other ferries in the State, and subject to the same regulations, is claimed to be a direct recognition of its rights to a single taxation or license, as is or may be required of other ferries, but not in any way exempting it from taxation.

In the case of Chalmers vs. the People, 11 Mich. 42, a license fee of $50 per boat is sustained on the ground that by the charter of Detroit the city is expressly authorized to direct the manner of issuing and registering the license and to prescribe the sum of money to be paid therefor. It is also held in that case, to be a price paid for a franchise or a public right,

vested in an individual. In the case at bar, the franchise had been previously granted by act of the legislature, and by the general laws of the State the value of that franchise has been and is annually returned to the authorities and assessed for taxation, not only by the State and county but by this very city.—What does a franchise amount to, and why should plaintiff pay taxes upon it, if it cannot run its boats by its authority. In the Chalmers case, above cited, the $50 per annum license fee was sustained because the ferry franchise was granted by the license; but here the license has not only been granted, but the ferry franchise has regularly been returned and taxed as property already owned and possessed by the plaintiff.

The terms on which the State of Illinois will license foreign corporations to do business there have no analogy in this case. They are organized outside of that State and can only do business there on such terms as the State sees fit to impose. Their capital stock and franchises are not taxed there.

In the opinion filed in this case the Supreme Court of Illinois say, in effect, that the legislature made the plaintiff a corporate body, then it became authorized to operate a ferry, on its procuring a license, the same as a natural person could. Such, however is not the language of its charter. The charter expressly grants to the plaintiff the power "to keep a ferry."

If this is not a grant or license from the State of Illinois to the plaintiff to operate a ferry, then we submit the language used does not mean what it says. If such license were granted to a natural person, it seems as though the authority would be complete. And the power, being once granted, must continue until revoked by the consent of both parties.

II.

Upon the second assignment of errors the plaintiff claims that the authority exercised under its license from the United States is a protection from any tax for operating its boats. If the defendant cannot prohibit the plaintiff from running its boats it cannot set a price and require its payment for permitting the plaintiff to do what it is licensed to do by the laws of the United States. In the case of Gibbons vs. Ogden 9 Wheat. 214 in speaking of the license issued by the general government the Court asks the question: "Would the vidality or effect of such an instrument be be questioned by the respondent if executed by persous claiming regularly under the laws of New York?"

III.

Is this demand a regulation of commerce?

The plaiutiff claims that the laws and regulations of the United States completely cover the whole ground, and that any regulation by the State, if this can be termed such, is void.

By section 4,426, p. 863, Revised Statutes U. S., every ferry-boat propelled by steam must be inspected under the provisions of that title, (LII); and such other provisions of law for the better security of life as may be applicable to such vessels, shall, by the regulations of the board of Superivising inspectors, also be required to be complied with, before a certificate of inspection shall be granted; and no such vessel shall be navigated without a licensed engineer and a licensed pilot.

Secs. 4,399 and 4,400 of same chapter, make all vessels propelled in whole or in part by steam; with certain specified exceptions, subject to the regulation of Title LII, which on examination will be found full and complete, and cover the entire range of police powers necessary or proper to be exerised for the protection of life and property on the navigable rivers.

That the power to regulate commerce includes the regulation of navigation, we consider settled.
Cooley vs. Board of Wardens, 12 How, 315.

In 1872 the legislature of Missouri passed a law forbidding Mexican, Texas or Indian Cattle from being brought into that State between the first day of March and the first day of November in each year. Regarding this Statute the Court say:

"It seems hardly necessary to argue at length that unless the Statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively with Congress. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is inter-State than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the trasportation of property from one State to another is a branch of inter-State commerce is undeniable and no attempt has been made in this case to deny it." *

* * "This Court has heretofore said that the inter-State transportation of passengers is beyond the reach of a State legislature. And if, as we have held State taxation of persons passing from one State to another, or a State tax upon inter-State transportation of passengers, is prohibited by the Constitution because a burden upon it, a *fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden upon it by legislative authority, is regulation. *Case of State freight tax*, 15 Wall, 232; *Ward vs. Maryland*, 12 id, 418; *Walton vs. State of Missouri* 91 N. S. 175: *Henderson* vs. *Mayor of New York City* 92 id, 259; *Chy Lung* vs. *Freeman* id. 275. The two latter of the case refers to obstructions against the admission of persons into a State, but the principles asserted are equally applicable to all subjects of commerce."

Railroad Co. vs. Husen 95 U. S. 369.

"The same is true of turnpikes and ferries. By such statutes the States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or inter-State commerce. Hull vs. DeCuir, 95, U. S. 488.

In passenger cases, 7 How. 414, Mr. Justice Wayne uses the following language: "That the power in Congress to regulate commerce with foreign nations and among the several States includes navigation upon the high seas, and in the bays, harbors, lakes and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant."

IV.

It is a Tonnage Tax and is prohibited by the Federal Constitution.

It will be observed that the ordinance calls for "one hundred dollars license for each boat plying between this city and the opposite bank of the river." The city is not authorized by its charter to license ferries or collect license fees of keepers of ferries, but only to license, tax and regulate their boats.

A tax of five dollars on every ship arriving in the port of New Orleans is a regulation of commerce and a duty on tonnage and is unconstitutional and void.
Steamship vs. Port Wardens, 6 Wall. 31.

Ships when duly registered and enrolled, are instruments of commerce, and are to be regarded as means employed by the United States in execution of the powers of the Constitution, and therefore are not subject to State regulation.
Transportion Company vs. Wheeling, 99 U. S. 283—1878.
Sinnot vs. Mobile, 22 Howard. 227.
Henderson vs. New York, 92 U. S. 259.

Tonnage duties on ships by the States are expressly prohibited, but taxes levied by a State, upon ships or vessels owned by citizens of the State as property, based on a valuation of the same as property, are not within the prohibition:
Transportation Co. vs. Wheeling, 99 U. S. 283—1878.
Steamship vs. Tinker, 94 U. S. 238.

Duties on tonnage, says Cooley, the States are forbidden to lay; but he adds that the meaning of the prohibition seems to be that vessels must not be taxed as vehicles of Commerce, ac-

cording to capacity, it being admitted that they may be taxed like other proporty.

Ibid, citing Cooley Const. Law: 4th Ed. 606.
State Tonnage Tax Cases, 12 Wall. 213.
Cannon vs. New Orleans, 20 Wall, 577—1874.

CONCLUSION.

It is deemed proper to notice some of the arguments heretofore used and the authorities cited in support of this arbitrary and unjust exaction.

In the opinion of Judge Walker in this case, it is said the plaintiff for years paid annually to St. Clair County $300, "thus showing that, by its own construction of its Charter the power to require this fee was conceded, and the ferry Company should now be held to that construction."

That construction of the Charter is admitted, but as above above shown, the payments were made under a general law, applicable to all the ferries in the State and was expressly called a tax in the Statute under which the payments were made; therefore it is in harmony with the construction now contended for, as all other ferries in the State were subject to the same regulation.

It is further said that tonnage taxes and regulations of commerce relate to a wholly different class of vessels. The acts of Congress and the regulations made thereunder are made to apply, in express terms, to this very class. These laws are passed by Congress under its power to regulate commerce. They can be passed under no other. The law, then, determines the classes of vessels to which they are applicable. Titles L and LII of the Revised Statutes of the United States are especially referred to. By these laws and the regulations thereunder, steam ferryboats upon navigable waters, of more than twenty tons burden are classed with vessels in the coasting trade, and by that classification we must be governed. Before the law, a steam ferryboat of twenty tons is entitled to the same protection as the largest ship that ever "plowed the deep."

The case of Gibbons vs. Ogden is cited as holding that ferries are not included in regulations of commerce. Upon an ex-

amination of that case it will be seen that only such are mentioned as are "within the territory of a State."

Transportation by railroad and steamboats is held to be commerce, and burdens laid upon them by the States to be regulations thereof and void. If 50 car-loads of cattle are transported by steamer from Alton to St. Louis, that is clearly within the rule. If they are transported from Alton to East St. Louis by railroad, that is also within the rule. Why, then, if they are carried over the river on the bridge or the ferry, is that not commerce also? If it is commerce between the States to carry freight between Alton and St. Louis, what reason exists for its not being the same between East St. Louis and St. Louis? What principle is involved in the one case that does not apply in the other?.

The case of Conway vs. Taylor, 1 Black, 603, is also cited as authority upon the question as to whether this demand is a regulation of commerce. The point decided in that case was that, although enrollment of the Commodore, ascertained her ownership, and gave her a national character and the license gave her authority to carry on the coasting trade, neither of these could give "authority to her possessor to invade the rights of property." That case only decided that the Government license gave her no right to unlawfully invade the territory of another ferry. In this case, it is not claimed the plaintiff is not subject to the laws of Illinois, and its powers of police; but the claim is that this demand is not a police regulation. If the power of taxing the plaintiffs boats $100 each, per annum, is conceded, what reason can be urged why the tax should not be doubled or trebbled at will? *It* was first fixed at $50 per annaum. There is no limit, if the power exists to demand this exaction. As was said in Conway vs. Taylor, *Supra*, "A ferry franchise is as much property as a rent or any other corporeal hereditament, or chattels, or reality. It is clothed with the same sanctity and entitled to the same protection as other property."

It is futher claimed that the general police power of the State is sufficient to maintain this demand. That it is not a police regulation the following case appears in point:

Where a city ordinance required a license for running street cars the Court say: "The ordinance imposes no duties to be observed by the company or its servants, but the single act of paying the money. It prescribes no regulations in regard to the size, dimensions, comfort or cleanliness of the cars, the speed at which the same shall be run, the manner of receiving and discharging passengers, their numbers and names, and the station at which they shall stop. Regulations of police are regulations of domestic or internal government, forbidding some things and enjoining the performance of others, for the security and protection and to promote the happiness of the governed. The only act enjoined by the ordinance in question is the payment of the fifty dollars, and the only act which it forbids and prohibits is the running of the cars without the payment of the money. If the legislature should, by law, require every head of a family throughout the State to pay to the collector the sum of twenty dollars and take his receipt therefor, it would be a fiscal measure, an expedient to replenish the treasury, not a regulation of police prescribing a rule of action and conduct. So with this ordinance; call what it requires by the name of license or certificate of payment or anything else, its primary and indeed only purpose is to take from the company, under coercion of the penalty which it imposes, the sum of fifty dollars, annually, for each car run upon the road, for the benefit of the city. The certificate which the company is to receive, upon payment being made is called a license in the ordinance. A license to do what, the ordinance does not say, and indeed it could not with truth say a license or permission to employ the cars in the transportation of passengers on the road, for the absolute right to do that had not only been acquired, but positively enjoined upon the company by the stipulations of the grant of the 15th of Dec., 1852. It is in vain, therefore, to speak of it or treat it as a license, or a regulation of police. It is the imposition of an annual tax upon the company, in derogation of its rights of property, and on that account is unlawful and void."

Mayor vs. Railroad company 32 N. Y. 261.

That is exactly this case.

H. P. BUXTON, for Plaintiff in Error.

17-365

OFFICE SUPREME COURT U. S.
FILED
JAN 15 1883
JAMES H. McKENNEY, Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

WIGGINS FERRY COMPANY,
vs.
THE CITY OF EAST ST. LOUIS.
No. 749.

BRIEF FOR DEFENDANT IN ERROR.

M. MILLARD,
Of Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

WIGGINS FERRY COMPANY,
vs.
THE CITY OF EAST ST. LOUIS.
} No. 749.

BRIEF FOR DEFENDANT IN ERROR.

I.

The first point made, is that the charter of plaintiff in error contains an exemption from taxation in this form, unless the exaction is a tax on property, that it is a mere license fee which the company is not obliged to pay because the State in granting the franchise to operate a ferry, stipulated that nothing but a tax upon property should be collected.

The fourth section of the company's charter, instead of relieving it from ordinary taxes, expressly requires that they should be paid. There is nothing said about exemption from burdens of any nature which the State might be authorized to impose.

It has often been decided by this Court that a surrender of the power to tax, regulate or control a private corporation, is not to be supposed in the absence of language which will ~~incse~~ no other construction. The intention must be clear and the words susceptible of no different meaning.

Bank v. Tennessee, 104 U. S. 493.

Here it was said restrictions on the taxing power were to be strictly construed; that nothing was to be taken by inference; and if a doubt existed, the decision must be in favor of the State.

In support of this case, there are numerous others going much farther than is necessary in the present instance.

Railroad Company v. Commissioners, 103 U. S. 1.
Wilson v. Gains, 103 U. S. 417.
Morgan v. Louisiana, 93 U. S. 217.
Railroad Co. v. Gains, 97 U. S. 697,
Railroad v. County, 102 U. S. 273.

But these decisions are not necessary. As we read defendant's charter, there is no exemption expressed or implied. There is nothing whatever in the case upon which to base such a claim. So far as the charter touches this subject, it goes the other way. Out of an abundance of caution, it declares the company shall be taxed. This is all there is of it, and certainly cannot be regarded as an exemption.

Hence there is no impairment of the obligation of a contract.

II.

The other objections may be considered under one head, as they all raise the general question as to whether the subject of ferries comes within any power granted to the Federal Government, or the domain of congressional legislation.

This Court has always held that ferryboats are not to be regarded as vessels engaged in commerce; and State taxation and regulation of them has been allowed from the beginning down.

Gibbons v. Ogden, 9 Wheat. 1.

In this case, when the question first came up as to the extent of the power of Congress to regulate commerce, the Court say, in speaking of inspection laws:

"They form a portion of that immense mass of legislation which embraces everything within the territory of the State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarrantine laws, health laws of every description, as well as laws for the internal commerce of a State, and those which respects turnpike roads, *ferries*, etc., are component parts of this mass. *No direct power over these subjects is granted to Congress, and consequently they remain subject to State legislation.* This was in 1824.

Again in 1837, the Court, in referring to Gibbons v. Ogden, *supra*, adopted the same language and held that ferryboats were exempt from the power of Congress to regulate commerce.

City, New York v. Miln, 11 Peters 147.

And Story on the constitution takes this view, and expresses it in the same language.

But the most satisfactory case is

Conway et al. v. Taylor, &c., 1 Black. U. S. 603.

The case grew out of a contest between two ferries, one claiming a *exclusive* right as riparian owner under the laws of Kentucky, to operate a ferry, and the other, an Ohio corporation, asserting that such a right was in direct conflict with the power of Congress to regulate commerce between the States, and the laws of the United States under which their boat was duly licensed, enrolled, etc.

What had been said in Gibbons v. Ogden, in respect to

turnpikes, ferries, etc., was repeated and applied to the case before the Court.

After stating that the laws of Kentucky, which absolutely excluded the Ohio ferryboat from landing on the Kentucky shore, did not infringe on the commercial power of the nation, Justice Swain proceeded to say:

"We find nothing in them transcending the legitimate exercise of the legislative power of the State. * * There has been now nearly three quarters of a century of practical interpretation of the constitution. During all that time, as before its birth, the States have exercised the power to establish and regulate ferries: *Congress never*. We have sought in vain for any act of Congress which involves this power. That the authority lies within the scope of that immense mass of undelegated powers which are reserved to the States respectively, we think too clear to admit of a doubt. We place our judgment wholly on that ground."

Thus it is clear, under these rulings, that ferryboats are not vessels engaged in commerce, and hence may be taxed and regulated by the States without violating any law of Congress.

The prohibition against laying a tonnage tax does not apply for the same reason. The subject is within the domain of State legislation and no law of the general government can impose a limitation or restriction.

Whether there is any authority under the laws of the State for the exaction of this fee is not a question here.

The State Supreme Court, has decided it is a lawful demand. That ends the controversy. The subject is left with the State. Its laws and decisions are to control.

There is, then, no law impairing the obligation of a contract or encroaching upon any power of the Federal Government.

The decisions of this Court settle both questions adversely to plaintiff in error.

As to the first proposition, that there is an exemption in its charter, we have cited numerous cases holding to the contrary; and as to the second, that there has been an invasion of the powers of the National Government, we have referred to authorities directly in point.

M. MILLARD,

Of Counsel for Defendant in Error.

17-265

IN THE SUPREME COURT OF THE UNITED STATES.

TO THE OCTOBER TERM, A. D. 1882.

THE WIGGINS FERRY COMPANY,
Plaintiff in Error
vs:
THE CITY OF EAST ST. LOUIS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF & ARGUMENT FOR DEFENDANT IN ERROR.

J. M. FREELS,
B. H. CANBY,
Of Counsel for Defendant in Error.

A. R. FLEMING, Book and Job Printer, 305 N. Third Street.

IN THE SUPREME COURT OF THE UNITED STATES.

TO THE OCTOBER TERM, A. D. 1882.

THE WIGGINS FERRY COMPANY,
Plaintiff in Error.

vs.

THE CITY OF EAST ST. LOUIS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF & ARGUMENT FOR DEFENDANT IN ERROR.

I.

This suit was originally brought by the City of East St. Louis against the Wiggins Ferry Company, in the City Court of East St. Louis. The case was tried before the Court by consent of parties without a jury, and resulted in a judgment for plaintiff, for the sum of $1,600 and costs of suit. The defendant appealed to the Appellate Court of Illinois, where the case was again heard and the judgment of the Court below *affirmed*. The defendant then appealed to the Supreme Court of Illinois, which Court, after a careful consideration of the case, affirmed the judgment of the Appellate Court. Plaintiff in error was not yet satisfied, and asked a *rehearing*. The Court considered its petition, and after mature deliberation denied it. This judgment was final in Illinois, and the company, as a last resort, brings

the record here, and asks this Honorable Court to reverse and hold for naught the solemn judgment of the *three* Courts below.

In this last effort, as in those preceding, we think plaintiff in error must fail. The law and the evidence are against it. It is admitted that the ordinance under which this demand is made, was properly passed, is in full force, and that the amount of the recovery is correct, if the city had power to pass the ordinance.

The whole case then hinges upon this one question of *power*. Had the City of East St. Louis the power under the law to pass the ordinance requiring the demand? We think it had.

The plaintiff in error claims that the 4th section of the Act of 1819, "to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi," exempts it from this burden. That section is as follows:

"Section 4. That the ferry hereby established shall be subject to the same taxes as are now, or hereafter may be imposed on other ferries within this State, and under the same regulations and forfeitures."

Section 2, Art. 9, of the Constitution of 1848, says: "The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise. But the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery keepers, toll bridges and ferries, and persons using and exercising franchises and privileges, in such manner as it shall from time to time direct."

Section 1, Art. 9, of the Constitution of 1870, is substantially the same as the above section of the Constitution of 1848, and this has been so held. The Court say:

"It is said these cases all arose under the Constitution of 1848, and that the first section of article 9 of our present Constitution has changed the rule. The two sections are substantially the same.

The second section of article 9 of the Constitution of 1848, provides for levying a tax by valuation, and so does that of 1870. * * * Thus it is seen, even as to taxation, the two organic laws are substantially the same."

Walker v. Springfield, 94 Ill. 373.

Section 5, article 9, of the Constitution of 1848, says: "The corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." * * * This section 5, article 9, of the Constitution of 1848, is substantially the same as section 9, article 9, of that of 1870. The Court in construing the two sections say: "The clauses of the Constitutions of 1848 and 1870, which provide that municipalities may be vested with power to levy and collect taxes for corporate purposes, are the same in meaning, although not precisely the same in language. There is no difference. Both provide that such bodies may be vested with power to impose taxes for corporate purposes, and that such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. In meaning, the two clauses are precisely the same."

Lovingston *et al.* v. Board of Trustees, 99 Ill. 571.

With the foregoing provisions of the Constitution of

1848, and section 7 of the Act of 1853, in force, the Legislature of Illinois passed the Act of 1865, incorporating the City of East St. Louis. (Private Laws of Illinois 1865, p. 350,) which gave the city, among other things, the power "to license, tax and regulate ferries."

Under this grant, the City Council passed ordinance No. 70, section 10 of which required "keepers of ferries to pay fifty dollars license for each boat plying between this city and the opposite bank of the river for one year." Plaintiff in error recognized the power of the city to require this license, and paid it regularly as it became due, for several years.

In 1869 the General Assembly of Illinois passed the present charter of the City of East St. Louis.

Private Laws of Illinois 1869, vol. 1. p. 885.

Sec. 5, art. 3 of this charter says: "The City Council shall have power by ordinance * * * Fifty-third.—To regulate, tax and license ferry boats." 1 Priv. Laws of Illinois of 1869, pp. 888, 893.

It will be seen that the language of the grant in the charter of 1865 is the same as that of 1869, except that in the latter the words "to license ferry-boats" are used instead of the words "to license ferries" in the former Act.

Under this power "to regulate, tax and license ferry-boats," the City Council passed ordinance 317, under which this demand for license is made, parts of which are as follows:

Sec. 1 Art. I.—"That no person, firm, company or corporation shall be engaged in, prosecute, or carry on any trade, business, calling or profession hereinafter mentioned, without first having obtained a license therefor in the manner hereinafter provided."

Sec. 13.—"Keepers of ferries shall pay at the rate of one hundred dollars license for each boat plying between this city and the opposite bank of the river for one year. All boats used for the purpose of transporting persons or property, in barges or otherwise, across the river, shall be deemed ferry boats; *Provided*, that ferry boats employed in the carrying of passengers only, pay a license of twenty-five dollars for each boat per annum."

The foregoing are the provisions of the Constitution, statutes and ordinance involved in this case.

II.

It will be seen that section 4 of the Act of 1819, *supra*, requires that the ferry shall be taxed, and that it shall be subject to the same regulations and forfeitures as other ferries.

Plaintiff in error admits that it is liable to pay to the city an *ad valorem* tax on all its property, but insists that it has paid this, and that this license fee required for the privilege of running its ferry boats, is an *additional tax*, within the meaning of the Constitution of Illinois, and therefore inhibited by that instrument.

We contend that a *license* for the exercise of a privilege is *not* a tax in the constitutional sense, and, in this view, we are clearly sustained by the decisions of the Supreme Court of Illinois and the courts of other States.

The doctrine that a *license* is *not* a tax in the constitutional sense of that term is clearly established by the following, among other cases:

The People v. Thurber, 13 Ill., 554.
City of East St. Louis v. Wehrung, 46 Ill., 394.
Fire Ins. Co. v. City of Peori, 29 Ill., 180.
Ducat v. Chicago, 48 Ill., 172.

Walker v. City of Springfield, 94 Ill., 364.
Lovingston et. al. v. Board of Trustees, 99 Ill., 565.
City of East St. Louis v. Trustees of Schools 102, Ill., 489.
Cole et. al. v. Hall, Collector, 103, Ill., 30.
Wiggins Ferry Co. v. City of East St. Louis, 102 Ill., 560.

The above decisions of the Supreme Court of Illinois show conclusively, that the license in question is not a tax within the meaning of section 1, article IX, of the Constitution of Illinois.

They show that the constitutional provision in reference to taxation has no application to fees exacted for a license, and in this distinction the Illinois Court is sustained by the decisions of other courts.

Ex Parte Robinson, 12 Nev. 269.
Ex Parte Cohn, 13 Nev. 426.
Ex Parte Subenhauer, 14 Nev. 371.
Bohler v. Schneider 49 Ga. 195.
Home Ins. Co. v. Augusta, 50 Ga. 530.
City of Sacramento v. Crocker, 16 Cal. 122.
People v. McCreery, 34 Cal. 448.
Henry v. The State, 26 Ark. 525.
Straub v. Gordon, 27 Ark. 625.

This distinction or difference between a tax and a license fee is fully established by authority.

Wiggins Ferry Co. v. East St. Louis, 102 Ill. 566.
Cole v. Hall, Collector, 103 Ill. 31.

III.

Plaintiff in error admitted the power of defendant in error, under the Constitution of 1848, to require it to pay a license on its ferry-boats, and regularly paid said license

till the adoption of the new Constitution in 1870, and for more than four years after the adoption of that instrument, when it refused to longer pay this license on the ground that the Constitution of 1870 had taken away the power of the city, under the Constitution of 1848 to exact it.

We have seen that the sections of the two instruments governing this subject are substantially the same, and that the city's power to require the license in question under the former instrument was not taken away or impaired by the adoption in 1870 of the latter.

Walker v. Springfield, 94 Ill., 373.
Lovingston, et al v. Board of Trustees, 99 Ill., 571.

Hence it is liable under the Constitution of 1870, as under that of 1848, to pay a license to the city.

It is again urged by plaintiff in error that other ferries in the State are not required to pay this license, and that the ordinance therefore violates the rule of uniformity and is void.

"Other ferries," of which its learned counsel speaks, are located outside of the limits of this city, and therefore not subject to this demand. City ordinances are *local* laws and apply only to the city by which they are made. They have no effect *beyond* its limits, but they are not void for this reason.

Covington v. City of East St. Louis, 78 Ill., 549.

An ordinance of a Municipal Corporation passed in pursuance of the Act creating it, and within the power conferred, has, within the corporate limits, the force and effect of a law passed by the Legislature.

Mason, et. al. v. Shawneetown, 77 Ill., 533.

This ordinance applies to all ferries and ferry-boats in the city alike, and makes no discrimination. It is uniform

as to the class upon which it acts and answers the requirements of the Constitution. There is no force in this position.

Wiggins Ferry Co. v. East St. Louis, 102 Ill., 572.
Fredtwell v. Troy, 18 Kan., 271.
Ex parte, Siebenhauer, 14 Nebr., 372.

Plaintiff in error also claims that it has paid to the county of St. Clair the license required of *other* ferries in the county by general law. This may be true, but if so, it is one that could not be required of it. This county has no power to exact any license whatever from the Wiggins Ferry Company. This company was incorporated in 1853, and is exempt by statute from the payment of this *county* license which it claims to have paid, and doubtless for the very reason that it was required by law to pay a license on its ferry-boats to the city of East St. Louis, which other *ferries outside* of the city were not.

Section 9 of the general statute, requires *ferries* to pay to the county in which they are located a license of not less than $5, nor more than $300, as may be fixed by the County Board, and section 1, of this Act, provides, a penalty for its non-payment, but says among other things—"This section shall not apply to ferries heretofore established by law," as plaintiff in error was.

Rev. Stat. Ill., 1874, p. 530, Sec. 1.

This Act then does not apply to plaintiff in error which was "heretofore established by law," and if it has paid a license to the county, it can be no defense in this case. Plaintiff in error is located *within* the incorporate limits of this city, and its property and business interests receive the protection of the government and police force of the city, and it is just and proper that it should be required to bear its

proportional part of the burden and expense of sustaining the government which gives it protection.

Wiggins Ferry Co. v. East St. Louis, 102, Ill., 571.

If plaintiff in error were required by the general law, to pay a license to the county, which it is not, this would not exempt it from taking out the city license required.

Ex parte, Siebenhauer, 14 Nebr. 372.

IV.

And it is further claimed by plaintiff in error, that the Acts of 1819 and of 1853, constitute a contract between the Wiggins Ferry Company and the State of Illinois, which exempts it from the payment of this demand.

We have examined both Acts in vain for a section or a sentance that in any manner exempts plaintiff in error from the payment of this license. No terms are used implying an intention to exempt it, but if there were such terms, there being no consideration, they would not bind the General Assembly. An agreement without a consideration is a *nude pact*, and this rule of law applies to the agreements of States as well as to those of individuals. Tucker v. Ferguson, 22 Wall., 527. The presumption is against construing a statute as conferring an irrepealable exemption from taxes.

Mobile v. Stein, 54 Ala., 53.
Probasco Co. v. Moundsville, 11 W. Va. 501.

This claim, like those previously considered, has no foundation in law or fact to sustain it.

There is nothing in either Act that even savors of such an exemption, but quite to the contrary.

Section 4, of the Act of 1819, is the one relied on by the learned counsel of plaintiff in error for the exemption claimed. This section is as follows: Sec. 4. "That the ferry hereby established shall be subject to the same taxes

as are now, or hereafter may be imposed on other ferries within this State and under the same regulations and forfeitures."

This section, instead of exempting this Company from the payment of any such tax, expressly requires that it shall be subject to the same taxes as were then or might thereafter be imposed on other ferries within the State, and subject to the "same regulations and forfeitures." The Supreme Court of Illinois, in construing this section in this case say. "The Legislature did not agree to exempt this Corporation from taxes and other burthens," 102 Ill., 568. And it could not have thus exempted it, had it so desired. "The Legislature has power to create an artificial person called a corporation, and to endow it with rights and powers, resembling those of natural persons, but it has no power to endow such bodies with powers or rights higher or greater than those possessed by natural persons, nor can that body exempt such artificial persons from governmental control, regulation or obedience to the laws of the State, or the governmental burthens imposed on natural persons. When created, they become *quasi* inhabitants of the State, and entitled to precisely the same protection in their rights as natural persons, and they, on every principle of reason and justice, must be subjected to the same governmental control and regulation, and to all the burthens for the support of government to which natural persons are subjected. * * *. In the maintenance of the government and the general welfare, individual rights, whether of natural persons or corporate bodies, must yield to the public good, and the General Assembly is invested with the sole power of determining under what restraints all persons, whether natural or artificial, shall pursue their various avocations unless restricted by constitutional limitation. That is an essential attribute of government. The regulation of ferries is referrable to the police power,

which cannot be granted away even to corporations."

Wiggins Ferry Co. v. East St. Louis, 102 Ills., 569, 570.
Beer Co. v. Massachusetts, 97 U. S. R., 25.
Patterson v. Kentucky, 97 U. S. R., 501.
Stone v. Mississippi, 101 U. S. R., 814.

There is no exemption then from this burden contained in section 4, of the Act of 1819, relied on by plaintiff in error, and there can be none under the Act of 1853. Of this there can be no question.

With sections 2 and 5 of article IX, of the Constitution of 1848, *supra*, in force, the General Assembly, at the request of Samuel Wiggins and his assignees, passed the Act of 1853, incorporating "The Wiggins Ferry Company," plaintiff in error, which Act superseded and took the place of the Act of 1819, giving Samuel Wiggins the right to establish a ferry. Plaintiff in error then and there accepted this charter, and has existed, acted and done business under it ever since. This Act then is the source of its right to keep a ferry, and the measure of its power. It can only exercise such rights as are therein granted, and it is subject to and bound by all the conditions, restrictions and limitations therein contained.

Section 2 of article IX, of the Constitution of 1848, *supra*, says: "The General Assembly shall have power to tax peddlers, auctioneers, brokers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery keepers, toll bridges and *ferries*, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct." Thus it will be seen that the General Assembly are authorized to tax every profession, occupation, business and business interest, including *ferries*, carried on in the city, "as they shall from time to time direct." And section 5, article IX, *supra*, of said instrument, authorizes

the General Assembly to vest this power in "the corporate authorities of counties, townships, school districts, *cities*, towns and villages," and this the General Assembly have done as to the City of East St. Louis, in the charter granted to the city by that body in 1869.

1 Vol. Private Laws of Ill., 1869, pp. 888, 895, Sec. 5, Art. III.

In this section of the city's charter, the General Assembly have authorized it to license, tax and regulate the professions, callings, business and business interests named in the Constitution. The city accepted this charter, and in ordinance 317, the City Counsel have followed and kept within the title and spirit of the grant. By it the merchant, commission merchant, inn-keeper, liquor dealer, peddler, wagon and carriage drivers, and all keepers of ferries within the city, are required to pay a license to the city for the privileges exercised and the protection received to person and property from the city, and all these interests do and have paid the license, except plaintiff in error, and why should it not be required to do so? Why should it not be subject to similar burden for like privileges exercised and like protection received from the city? Are its property, business interests and rights more sacred than the property, business interests and rights of private individuals, of natural persons? Is the right to establish a ferry and run ferry boats greater or more sacred than the right to establish and run a dry goods store, grocery store, bank or other ligitimate business? Certainly not.

What is there then in this Act of 1853, authorizing it to establish a ferry that exempts it from the payment of this license, authorized by the Legislature, for the privilege of running its ferry boats? Nothing.

Section 7 of this Act of 1853 says: "Nothing in this Act contained shall be construed to create any private right

so as to interfere with the powers of any existing municipal corporation, or with the right of the Legislature at any time hereafter, to create municipal corporations within the limits herein specified, and to confer upon said corporations all such powers of police * * * as may be usually or properly confided to a city corporation under the Constitution of Illinois."

Priv. Laws of Ill., 1853. p. 193, sec. 7.

It is clear from the above section, that the claim of plaintiff in error to an exemption from this burden under this Act has no force.

There is no exemption in the Act of 1819, nor in that of 1853, nor elsewhere.

In a late and well considered case, Mr. Justice Field in delivering the opinion of this Court, says: "Against the power (to tax) nothing is to be taken by inference and presumption. Where a doubt arises as to the restriction, it is to be decided in favor of the State."

Bank v. Tennessee, 104 U. S. R. 495.

See also

Railroad Co. v. Commissioners, 103 U. S. R. 1.
Wilson v. Gaines, 103 U. S. R. 417.
Railroad Co. v. County of Hamblen, 102 U. S. R. 273.
Railroad Co. v. Gaines, 97 U. S. R. 697.
Wiggins Ferry Co. v. East St. Louis, 102 Ill. 570–1.
Burroughs on Taxation, Sec. 68,
Hart v. Plum, 14 Cal, 148.

In passing upon this question in this case, the Illinois Court say:

"The Legislature, even if it has the power to do so, did

not, in terms, exempt this corporation, by its charter, from the same power of control that it may exercise over a natural person, and we will not strain construction and violate the rule that in a grant by the Government all doubts must be solved in its favor, and nothing passes except it clearly appears to have been so intended. This rule is as old as the law itself. The charter gave this corporate body the right to establish and maintain a ferry, and that right was no greater than the same right possessed by an individual, and it has never been denied that the Legislature might impose a license fee to authorize a natural person to establish and maintain a ferry. The Legislature only conferred the same power on the corporate body as that possessed by natural persons, and it undoubtedly has the same right to limit and control its exercise of the right that it may the right of a natural person. It would be unreasonable, unjust and contrary to the great principle of equality of privileges and burthens, upon which our Government is based, to make corporate bodies a privileged class, and exempt them from the common governmental burthens. They, like natural persons, should contribute to the support of the Government that affords protection to all their rights."

Wiggins Ferry Co. v. East St. Louis, 102 Ill., 570 and 571.

"The General Assembly, instead of ceeding away its power to legislate on this subject, expressly reserved it. The power to establish municipal corporations within the limits of this ferry, and to confer upon them 'all such powers of police as may be properly confided to a city corporation under the Constitution of Illinois,' was expressly reserved. And we have seen that the Constitution of Illinois, authorized the Legislature to vest the power here in question in municipal corporations, and that it did this as to the City of East St. Louis, in its charter of 1869."

Sec. 5, Art. III, of which says: "The City Counsel shall have power by ordinance.

* * * Fifty-third. To regulate, tax and license ferry boats."

This is a valid enactment under the Constitution of Illinois, and authorizes the city to exact by ordinance the license in question. This it has done by ordinance 317.

That the city had power to pass the ordinance requiring the license, there can be no question.

The law is clear upon this point. The language of the statute, is the City Counsel shall have power by ordinance, "to regulate, tax and license ferry boats."

Charters with provisions similar to the above, have been before the Courts and held valid. The charter of Chicago, provides that the "city shall have power to tax, license and regulate auctioneers," etc., and in passing upon this grant, the Supreme Court of Illinois say: "The power conferred by the charter to tax, license and regulate auctioneers, authorized the city to adopt any reasonable ordinance for the purpose. * * * They may tax, may license and may regulate the business of auctioneers."

Wiggins v. City of Chicago, 68 Ill. 377.
Chicago Packing Co. v. Chicago, 88 Ill. 221.
Chilvers v. The People, 11 Mich. 43.

The case of Chilvers v. The People, *supra*, is a ferry case like the one at bar. By the charter of Detroit, power is given the Common Council "to *license*, continue and *regulate* so many ferries, etc., from within said city, to the opposite shore of the Detroit river, as shall seem most conducive to the public good." Under this grant the Common Council passed an ordinance similar to ordinance 317, except that it made the license fee $50 per boat. The Court held the ordinance valid, and the license fee a proper charge.

The power of the city to pass the ordinance being fully and clearly established, and it being admitted that the ordinance is valid and the amount of the recovery correct, if the city had power to pass it, it would seem needless to say more.

V.

But it is again insisted by plaintiff in error, that the license imposed on its ferry-boats, by the ordinance of defendant in error is void, because it is an interference with the power conferred by the Constitution of the United States upon Congress, to regulate commerce with foreign nations, among the several States, and with the Indian tribes The laws and regulations of Congress, requiring all vessels propelled by steam to be inspected and annually enrolled and licensed, are not passed in the exercise of the power to regulate commerce, and do not render void the license in question.

Judge Walker, in rendering the opinion of the Supreme Court of Illinois in this case, uses this language: "It is said that this is a navigable river, and therefore is under the control of Congress. And, it is further said, Congress has the power to regulate inter-State commerce, and has regulated it by requiring every ferry-boat propelled by steam to be inspected according to an Act of Congress, and such other regulations as Congress may prescribe shall be complied with, before a certificate shall be granted. Nothing, it appears to us, can be plainer than this was intended purely as a police regulation for the safety of persons, and not a measure in the slightest degree, to regulate commerce. The language cannot be tortured into such a purpose. The very language of the section states, it is for the better security of life, that the regulations shall be complied with, before the certificate of the inspector shall be granted. To hold that the section was intended to regulate commerce

would violate every known rule of construction, and this would seem to be obvious to all persons."

The Wiggins Ferry Co. v. The City of East St. Louis, 102 Ill., 572.

Cooley, in his work on Constitutional Limitations, says: "The States may lawfully establish ferries over navigable waters, and grant licenses for keeping the same, and forbid unlicensed persons from running boats or ferries without such license. This also is only the establishment of a public way, and it can make no difference whether or not the water is entirely within the State, or, on the other hand, is a highway for inter-State commerce."

Cooley Con. Lim. p. 740. (4th Ed.)

It has been repeatedly decided by this Court, and by the Courts of the several States that ferries are the creatures of local legislation, and are subject to the laws of taxation and the police powers and regulations of the States by which they are created, and do not fall within this constitutional provision.

Gibbons v. Ogden 9 Wheat. 1.
Conway *et al.* v. Taylor's Executor, 1 Black. 603.
Fanning v. Gregoire, 16 How. 534.
Cooley v. The Board of Wardens, 12 How. 320.
New York v. Miln, 2 Peters 141.
Chilvers v. The People, 11 Mich. 43.
Marshall v. Grimes, 41 Miss. 27.
The Chosen Freeholders v. The State, 4 Zabriska, 718.
The People v. Babcock, 11 Wend. 586.
Beer Co. v. Massachusetts, 97 U. S. 25.
Patterson v. Kentucky, Id, 501.
Stone v. Mississippi, 101 U. S. 820.

The first case in which this question came under discussion in the National Supreme Court, was that of Gibbons v. Ogden, 9 Wheat. 1, involving the right of Ogden as assignee of Livingston & Fulton, to the exclusive navigation of all the waters within the State of New York, with boats moved by fire or steam, under certain Acts of the Legislature of that State. It was claimed by Gibbons that the boats employed by him on the waters of said State, were duly enrolled and licensed to be employed in carrying on the coasting trade under the laws of Congress. Chief Justice Marshall delivered the opinion of the Court, and on page 203, he says: "But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the States. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce, is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government. All which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, *ferries*, etc., are component parts of this mass."

He further says:

"No direct power over these objects is granted to Con-

gress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for National purposes, it must be where power is given for a special purpose or is clearly incidental to some power which is expressly given."

The principles laid down in this case have been followed in subsequent cases.

In Conway *et al. v.* Taylor's Executor 1 Black 603, it is declared that the grant of a ferry franchise by a State is an exercise of the powers reserved to the States, and not surrendered to the general government.

Conway *et al.* were the owners of a boat called the Commodore, which they caused to be enrolled and licensed under the Acts of Congress for enrolling and licensing vessels to be employed in the coasting trade and fisheries. Taylor as the executor of his father was the owner of a ferry franchise granted by the County Court of Campbell County Kentucky, to keep and operate a ferry from his landing in front of Newport, across the Ohio river. An injunction was granted at the suit of Taylor's executor by the Court of Kentucky, to restrain Conway *et al.* from running the boat called the Commodore, as a ferry boat, between Newport in Kentucky, and Cincinnati, Ohio, in violation of his ferry rights, the injunction was granted by the State Court, and the case removed into the Supreme Court of the United States. Swayne, Justice, delivered the opinion of the Court. He says: "Lastly, it is urged that the Commodore having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrollment and license gave to the appellants in respect of that trade, by obstructing the free navigation of the Ohio. * * * * The language of the Constitution to which this objection refers is as follows: 'The Congress shall have power to regulate commerce with

foreign nations and among the several States, and with the Indian tribes.' Art. 1, sec. 8, clause 4. The character and extent of the power thus conferred, and the boundaries which separate that power from the powers of the States, touching the same subject, came under discussion in this Court for the first time, in Gibbons v. Ogden, 9 Wheat. 1. After quoting from that case the language of Chief Justice Marshall, which we have quoted above, he proceeds to say; "The same principle has been repeatedly affirmed in other cases, both in this and the State Courts. In Fanning v. Gregoire, 9, How. 534, before referred to, this Court held the argument that the free navigation of the Mississippi guaranteed by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither of these interfere with the *police power* of a State in granting *ferry licenses*. The Counsel for the apellees has invoked the authority of Cooley v. Board of Wardens of Philadelphia, 12 How. 299, in which a majority of this Court held that upon certain subjects affecting commerce, as placed under the guardianship of the Constitution of the United States, the States may pass laws which will be operative till Congress shall see fit to annul them. In the view we have taken of this case we have found it unnecessary to consider that subject. * * * That the authority lies within the scope of that immense mass of undelegated powers which are reserved to the States respectively, we think too clear to admit of doubt."

In the case of Chilvers v. The People, 11 Mich. 43, it was claimed that an ordinance passed by the City of Detroit imposing a license of $50 a year on each ferry-boat engaged in transporting passengers or property from within that city to the opposite shore in Canada, and punishing any violation of such ordinance by a *fine*, was a regulation of commerce within the Constitution, which gives Congress the power to regulate commerce with foreign nations, and among the sev-

eral States, and with the Indian tribes, the vessel in that case being enrolled and licensed under the laws of Congress. It is said: "The fallacy of the doctrine contended for consists in supposing that the licensing of a vessel for the coasting and foreign trade confers on it the franchise of a ferry. Ferries are as clearly creatures of local legislation as roads and bridges, and the establishment *and regulation of them* are as necessary for the convenience of the traveling and business public."

The case of Marshall v. Grimes 41 Miss. 27, was a bill filed for an injunction by Charles K. Marshall in the Chancery Court of Warren County, alleging that by an Act of the Legislature of the State of Mississippi passed Nov. 29, 1865, the exclusive right of running a ferry-boat across the Mississippi river within certain limits, was granted to him, that he had at great expense purchased a large steam ferry-boat and brought it to the ferry-landing at Vicksburg, and was fully prepared to comply with all the terms and stipulations of said Act of the Legislature; that Wm. Grimes and others in violation of the rights granted by that Act, placed a ferry-boat to run within the limits granted to complainant, and persist in running said ferry-boat in violation of said Act; prayer for an injunction etc.

The defendant admitted that he was running the boat as alleged, but set up that it was regularly enrolled and licensed in the office of the Collector of Customs at Vicksburg in accordance with the Acts of Congress, to carry on the coasting trade to and with the State of Louisiana; that the Mississippi river is a navigable stream, and by virtue of the Constitution of the United States and the laws aforesaid, he had a right to use said boat in carrying freight and passengers as aforesaid.

The Supreme Court in their opinion, say: "The Act of the Legislature grants the exclusive privilege of keeping and

maintaining a ferry across the Mississippi river, for the accommodation of such persons and movable property as may be for transportation to a point on the Louisiana shore, opposite the City of Vicksburg, which right is to cover the banks of the river for a distance on each side of that city, up and down the river, of four miles, and prohibits any other person from keeping a ferry within the specified limits Is this grant then a usurpation of the power belonging to Congress to regulate commerce among the States? It is true that ferries, whether confined to the limits of a single State or extending across rivers from one State to another, may be very materially connected with commerce between the States as the modes of conveyance by which trade is carried on between them. But it by no means follows that they are embraced in the power delegated to Congress to regulate commerce among the States, and that they are subject to the regulation of the federal government. They are, from their nature, matters of internal police of the State, essential to her domestic interests, and must necessarily be under the power of the State; the ends of public convenience intended to be subserved by such franchises, cannot be attained without regulations of law for the faithful and efficient performance of the duties required; and inasmuch as the propriety of such regulations depend greatly on local circumstances, governing each case, the State Legislature, or tribunals authorized by it, are manifestly the proper depository of that power. Hence it is well settled, that the power to establish and regulate ferries, has not been delegated by the States to the federal government, and consequently that it legitimately belongs to the States."

In Fanning v. Gregoire, 16 How. 534, the Court say:

"The argument that the free navigation of the Mississippi river guaranteed by the ordinance of 1787, or any right which may be supposed to arise from the commercial power of Congress, does not apply in this case. Neither of these

interfere with the police power of the States in granting ferry licenses."

In Cooley v. Board of Wardens of Philadelphia, 12 How. 320, the same Court say: "The mere grant to Congress of the power to regulate commerce, did not deprive the States of the power to regulate pilots." And that power is entirely analagous to that in relation to ferries, so far as each case may be affected by the provisions of the Constitution of the United States.

In the case of the City of New York v. Miln, 2 Peters, 141, the doctrine upon this subject is thus stated:

"That all those powers, which relate to merely municipal legislation, or what may perhaps more properly be called *internal police*, are not thus surrendered or restrained, and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."

The same principles are held in a well-considered and lucid opinion of the Court of Errors and Appeals of New Jersey, in *The Chosen* Freeholders v. The State, 4 Zabriska, 718, and by the Supreme Court of New York in The People v. Babcock, 11 Wend. 586, Nelson, J., in the latter case uses the following forcible language: "The constitutional power of Congress to regulate commerce with foreign nations stands upon the same footing as that which may exist among the several States, and if the State has not reserved the right to establish and regulate ferries upon the waters in question within her limits, then she has not the right to establish and regulate ferries upon the waters separating her from other States; and the consequence would be, that no public ferries could exist in all these cases, unless under the authority of Congress. Such power has never been claimed by Congress; and on the contrary, it has always been exercised by the several States between which a ferry is practicable and convenient."

In the case of Smith v. Turner, 7 Howard, 393, the Court say: "A State cannot regulate commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A State may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail, any more than taxing a ship regulates commerce."

In the case of Freeholders of Hudson Co. v. The State, 4 Zabriska, 718, the Court in its opinion says, "That the State may regulate the tolls and fares on turnpikes and railroads and ferries wholly within its jurisdiction, counsel have not gone so far as to deny. But such regulation will, in many cases, affect the commerce among the several States, as much as the regulation of tolls at a ferry directly between the States. A large portion of the commerce between Philadelphia and New York passes by means of the roads and canals through New Jersey, which latter State has always regulated the tolls without question. If the States separately or jointly cannot regulate a ferry between two of them, neither can they authorize the building of a bridge, or prescribe the tolls for passing it. These, and the like powers, have been exercised by most of the States of the Union, without doubt or hesitation, from the adoption of the Constitution to the present day, and are, in my opinion, in no wise repugnant to the provisions of that instrument."

VI.

It is also claimed, that this license is a tonnage tax and prohibited by the Federal Constitution.

Attention is directed to the fact, by the learned counsel for plaintiff in error, that the ordinance provides for a license of one hundred dollars for each *ferry boat* plying between the city and the opposite bank of the river, and that the city

is not authorized to license *ferries*, or collect license fees of keepers of ferries, but only to license, tax and regulate *their boats*, and from this the argument is made that the license is a tonnage tax, and therefore void.

If the power exists to license *ferries*, it would seem that it could make no difference in what form that license is imposed; whether in a gross sum for keeping a *ferry*, or at so much per annum for each boat.

The power of a State to impose a tax in the way of license upon all pursuits and occupations within its limits has never been seriously questioned.

Nathan v. Louisiana, 8 How. 80, 82.
License tax cases, 5 Wall. 472.
Welton v. Missouri 91 U. S. 278.

The Supreme Court of Illinois, in their opinion in this case say. "The Constitution has not prohibited the General Assembly from imposing or authorizing the imposition of the duty to procure a license to pursue any calling, nor has it limited the power or limited its exercise. In this respect the power of the Legislature is the same as it has ever been since the organization of the State government, and no one, we presume, will question the legislative power to require persons, engaged in various avocations, to procure a license for the purpose, and thus regulate the exercise of an avocation. It is a power exercised by *all* governmets, and is one of the essential means of providing for raising revenue for both the State and local governments, and the regulation of business. If the Costitutional Convention had intended to make so radical a change as to deprive the Legislature of this power, or to make a license fee uniform throughout the State, on all persons exercising the same calling, without regard to the capital invested, business done or profits realized, that body would have employed very different language from that which we find in that instrument."

Wiggins Ferry Co. v. East St. Louis, 102 Ill. 567.

Upon the question of its being a tonnage tax, the same Court use this language. "It is again said it is a tonnage tax and a regulation of commerce. How this can be said to be a tonnage tax on a ferry boat, or a regulation of commerce, is to us incomprehensible. That tax applies to a wholly different class of vessels as is shown by the following decisions," citing.

Gibbons v. Ogden, 9 Wheat. 1.
Fanning v. Gregoire, 9 How. 534.
Nathan v. Louisiana, 8 How. 73.
Woodward v. Parkham, 8 Wall. 123.
Hinson v. Lott Id., 148.
Chilvers v. The People, 11 Mich., 43.

From the foregoing, we think it clear that the judgment of the Supreme Court of Illinois should be affirmed.

J. M. FREELS,

B. H. CANBY,

Of Counsel for Defendant in Error.